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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 242

COMPANIA ESPANOLA DE NAVEGACION MARITIMA, S. A., OWNER OF THE SPANISH STEAMSHIP "NAVEMAR",

Petitioner,

against

SPANISH STEAMSHIP "NAVEMAR", HER ENGINES, ETC., AND RAFAEL CRESPO, JOSE ARANA, MANUEL FREIRE, GASPAR LOPEZ AND ANTONIO SANCHEZ,

(No appeal was taken by them)

FERNANDO DE LOS RIOS, AMBASSADOR OF THE REPUBLIC OF SPAIN, APPLICANT,

Respondent in this Court.

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT.

CHARLES W. HAGEN,
HORACE T. ATKINS,
JESSE L. ROSENBERG,
JOHN S. BULL,
Counsel for Respondent.

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At the argument we called attention to a recent decision of the Court of Appeal of England in the "Cristina" which at present is reported only in Volume 59, Lloyd's List Law Reports, pages 47 to 51, inclusive, and which we have re-

printed for the convenience of the Court. The only citations of this case in the Court of Appeal and in the lower court are as follows:

The "Cristina" and other vessels, Volume 59 Ll. L. Rep. 1. (Decision of the lower court, Admiralty Division, rendered October 15, 1937.)

The "Cristina" and other vessels, Volume 59 Ll. L. Rep. 47. (Decision of Court of Appeal, rendered November 8, 1937.)

The Court of Appeal refused to allow an appeal, but the Appeal Committee of the House of Lords has consented to hear the case. This appeal will be heard by the House of Lords on January 14 or 15, 1938.

The facts and proceedings in the "Cristina" are in all material respects similar to those in the case which this Court is now considering, except that the seizure of the "Cristina" took place in the territorial waters of Great Britain (Cardiff, Wales), whereas the "Navemar" was in the actual possession of the Republic of Spain before the vessel had arrived in the territorial waters of the United States (Opinion, C. C. A., R. 232).

The procedure of the Ambassador of Spain in attempting to raise the jurisdictional question parallels in every respect the procedure of the Spanish Ambassador to Great Britain in the case of the "Cristina".

In the latter case the motion of the Spanish Government "was started by two affidavits, sworn by the Counsellor of the Spanish Embassy." In these affidavits it was alleged that the "Cristina" had been requisitioned by the Spanish Goverment under a decree issued at Valencia on June 28, 1937; that the decree had been signed by President Azana; that by virtue of this decree the Government of Spain claimed and was entitled to possession of the ship under the requisition; that the Government of Spain was unwilling to submit to the jurisdiction of the British Admiralty Court.

We respectfully refer the Court to the material allegations contained in the Suggestion of Fernando de los Rios, Ambassador of Spain to the United States, which are summarized at page 28 of our main brief, and which appear at pages 120 to 126 of the Record.

The proceedings in the present case were started by an affidavit of Luis Careaga, Secretary of Embassy and Consul in Charge of the Consulate General of Spain in New York, New York (R. 127) who had been duly authorized by the Ambassador to make these representations (R. 257). In this affidavit it is alleged that the "Navemar" was requisitioned by the Spanish Government under a decree issued on October 10, 1936; that the decree was signed by President Azana (R. 120); that by virtue of this decree the Government of Spain was entitled to possession of the ship under the requisition (R. 124); that the Republic of Spain is a sovereign nation (R. 119) and that the Republic of Spain has never consented that the said Steamship "Navemar" might be proceeded against judicially by libel or otherwise, or that the Republic of Spain itself be subject to the jurisdiction of the court (R. 127).

The principles of law applicable to the situation now under consideration by this Court are well stated in the Judgment of Lord Justice Greer in the Court of Appeal in the "Cristina", 59 Ll. L. 47, 49.

The judgment of Mr. Justice Bucknill in the Admiralty Division in the "Cristina", 59 Ll. L. Rep. 1, 5, which was approved by the Court of Appeal, reads in part as follows:

> "Now, as I have said at the beginning, the Spanish Government, which has taken this action in the matter, is an independent Sovereign State recognised by this country and is so admitted to be by the owners of the ship, and that being so I think it is impossible for this Court to exercise jurisdiction over the Cristina, a ship which they—the Spanish Government—claim to

have requisitioned, to have a right of possession in, and to have taken such steps as were available to the Government actually to be in possession of her, and I think that this writ should be set aside.

"As regards the point that the necessary affidavits have not been made from the appropriate quarter, I am satisfied that the Spanish Government has made this application through its responsible officers and has properly put forward the essential allegations in the case. For that reason I direct that the writ and the arrest be set aside."

The letter of the master of the "Navemar" in which he stated that the ship was in the possession of Spain since October 1936 (Ex. 6 and 7; R. 25) has not been reproduced in the record by petitioner. However the translation (Ex. 7) of that letter (Ex. 6) is correctly quoted at pages 6 and 7 of respondent's brief.

At page 14 of the reply brief on behalf of petitioner, there is a serious error in quotation which must have been unintentional on the part of petitioner's counsel. It is said that respondent conceded in the District Court that the Republic of Spain had "at most only a constructive possession (R. 170)." What counsel has quoted is a conclusion of the District Court which the Circuit Court rejected (R. 232). What we had said in the District Court was that *actual* possession of the vessel had been taken at the time the master was permitted to sail to New York (R. 94) which was on October 28, 1936, when the vessel was at Buenos Aires (R. 95). The very fact that a possessory libel was filed would seem to indicate that the "Navemar" was in the actual and not constructive possession of the Republic of Spain.

Respectfully submitted,

CHARLES W. HAGEN.

APPENDIX.

LLOYD'S LIST LAW REPORTS.

Nov. 25, 1937.

COURT OF APPEAL.

Monday, Nov. 8, 1937.

The "Cristina" and Other Vessels.

Before Lord Justice GREER, Lord Justice SLESSER and Lord Justice SCOTT.

International law—Ship—Arrest of Spanish steamship Cristina by owners—Writ in rem—Motion by Spanish Government to set aside writ and arrest—Plea that Spanish Government by decree had requisitioned the vessel, and that the owners' writ thereby impleaded the Spanish Government and must therefore be set aside—Vessel outside Spanish territorial waters at time of decree—Extraterritorial jurisdiction of Sovereign State.

———Held, that the Admiralty Court was bound to accept as conclusive the declaration made by the Spanish Government, which was recognised by His Majesty's Government as an independent Sovereign State, that the decree of requisition issued by the Spanish Government was intended to apply to the Cristina and that they had taken such steps as they could to take possession of the vessel in accordance with their decree before the owners' writ was issued, and that as the Spanish Government had not consented to an order being made against them, the writ and arrest must be set aside.

———Appeal dismissed.

This was an interlocutory appeal from a judgment of Mr. Justice Bucknill (p. 1 *ante*) upholding a motion on behalf of the Spanish Government to set aside the writ and all subsequent proceedings by the owners in the cases of the Spanish steamships *Cristina*, *Arraiz* and *Marques de Urquijo*, on the ground that the vessels had been requisi-

tioned by the Spanish Government, and that these proceedings impleaded that Government as being a foreign Sovereign State, recognised by H. M. Government as such.

The owners of the vessels, which were lying in South Wales ports, had issued writs claiming possession of them, and at their instance the Admiralty Marshal had arrested the vessels.

Mr. Justice Bucknill, holding that the applicants were a Sovereign State, said that it was impossible for the Court to exercise jurisdiction over those vessels, and he accordingly set aside the writs and the arrests.

Mr. G. St. Clair Pilcher, K. C., and Mr. O. L. Bateson (instructed by Messrs. Petch & Co.) appeared for the Spanish Government; Mr. H. U. Willink, K. C., and Mr. H. G. Willmer (instructed by Messrs. Ince, Roscoe, Wilson & Glover) represented the owners of the *Cristina,* the *Arraiz* and the *Marques de Urquijo.*

Mr. WILLINK said that the appeal was from an order of Mr. Justice Bucknill setting aside the writ for possession and the arrest of the steamship *Cristina,* the property of the appellants. The ground of Mr. Justice Bucknill's order was that it impleaded a foreign Sovereign State. Counsel understood that there were many other vessels with regard to which the facts were similar to those of the *Cristina,* but those facts were not before the Court. The plaintiffs were the owners of the vessel, with head offices at Bilbao.

Lord Justice SCOTT: Are they still carrying on there?

Mr. WILLINK: What is going on in Bilbao at the present time is a little obscure. There are grave difficulties with regard to business in such a port. There are 20 or 30, or possibly more, ships in a similar position to that of the *Cristina,* and this case is a test action, although the facts may not be exactly the same. There is no dispute that the *Cristina* is the property of the plaintiffs, and they are claiming something which is admittedly their own property. The *Cristina* is now at Cardiff, and she has been there since some date in June or early July. To make it a little more precise, I think I should point out that the *Cristina* has not been within Spanish territorial jurisdiction at any time since June 28 of this year. On June 28 she was outside Spain and

Spanish territorial waters and has never been in Spanish territorial waters since that date. That is a matter of agreement between the parties. On June 28 a decree was issued at Valencia, signed by the President, I think, of the Spanish Government and one of his Ministers, requisitioning all vessels registered at Bilbao. I do not think there is any dispute in the ordinary way that under the ordinary principles of international law a requisitioning decree has no effect outside the territorial jurisdiction of the requisitioning State. That decree of June 28 was officially published in the "Gaceta" on the following day. The substance of it was that in the situation in which the Spanish Government found itself it was essential that they should have control of the means of transport.

Lord Justice SCOTT: A requisition does not import a change of property.

Mr. WILLINK agreed, but added that the effect of the requisition would depend upon what was done upon the requisition. The owner would have to do what he was told.

COUNSEL went on to say that on June 30 some communication evidently passed between the Spanish Government and that country's Consul-General in London. He wrote to the Spanish Consul in Cardiff. The effect of it was this: "It is for you to see that the owners do nothing with regard to the *Cristina,* and a list of some 58 ships. With regard to the 58 ships you are to see that no one acting on behalf of the owners shall interfere with them." All the captains on the register at Bilbao were to be directed to produce their papers to him. This communication was a kind of circular letter sent to all Spanish Consuls round the coast.

It so happened, continued COUNSEL, that the *Cristina* came to Cardiff on July 9, and the captain, so far as the evidence went, presented himself to the Spanish Consul in the ordinary way to report. In ignorance of the instructions the Consul had received he was handed a letter ordering him to bring any ship's papers for endorsement by the Consul to the effect that the vessel had been taken over and attached by the Spanish Government and Republic. The captain did not quite appreciate that that was a desirable course as he thought it would not be the desire of the owners. He took

the view that the decree had no effect on a vessel which had not been in Spanish territorial waters, and that he was not bound to put his vessel under the direction of the Spanish Republican Government if his owners did not desire to do so. He did not obey the instructions of the Consul and did not bring the ship's papers. Thereupon the Spanish Consul reported it to the Spanish Consul-General in London. The Spanish Consul-General said: "Dismiss him and hand over the ship to another merchant officer."

COUNSEL thought that the Consul at Cardiff had instructions to dismiss any other officers or members of the crew who were not inclined to follow the course indicated by the Spanish Consul. On July 13 the Consul wrote to the captain purporting to dismiss him and dismiss all officers and members of the crew who were not in sympathy with the Spanish Republican Government. In that letter he said, "I trust everyone will behave reasonably and no incidents will take place on board. If they do, the responsibility will fall on you (the captain)." Having written that somewhat remarkable letter and having taken that course—and one might imagine that it was well calculated to provoke disorder in the territory of his Majesty—he reported it to the Consul-General, and, he said, to the Spanish Ambassador. On the following day the Spanish Consul went on board the *Cristina* with a gentleman whom he described as Asolo, the new captain. The true captain not being on board, the Spanish Consul at Cardiff proceeded forcibly to open the captain's cabin, but did not find the ship's papers. The third officer of the *Cristina* was promoted chief officer. In those remarkable circumstances, said Counsel, it was not surprising that on July 22 plaintiffs issued a writ for the possession of their steamer, which was being held from them by a captain and others appointed by the Spanish Consul.

Those were the broad facts. COUNSEL knew that terrible things must happen in Spain during the civil war, but there was no reason why such conduct should be extended and take place in England.

COUNSEL proceeded to read the affidavits and documents and the judgment of Mr. Justice Bucknill. He contended that the action of the Consul was likely to provoke disorders

and breaches of the peace. The Spanish Embassy and the Consulate-General had embarked on an extraordinary course of conduct with regard to the *Cristina*, and the question was whether international comity applied in such a case where the steps which had been taken were likely to lead to scenes of disorder and bloodshed in British ports. A foreign State need not be a defendant unless it wanted to be. Further, the case was a difficult one on the facts, and where they were so extreme he thought the Court should not assume what were the principles of international comity.

Mr. Pilcher was not called upon to reply.

JUDGMENT.

Lord Justice GREEN: This is an appeal from an order of Mr. Justice Bucknill setting aside the writ for possession and the arrest of a vessel called the *Cristina*.

The *Cristina* is a vessel belonging to a company which is now carrying on its business at Marseilles and sailing its ships from Marseilles. At no material time was the vessel with which we are dealing within the jurisdiction or within the territorial waters of the Spanish Government, but I think, as will appear in a moment, that that is wholly irrelevant to the question we have to determine. There can be no doubt that certain decrees were passed by a body which may or may not have had in the Constitution of Spain power to make those decrees, so that the decrees became law. There is a dispute about that, and there is some evidence which was before the learned Judge, and before us, to the effect that those decrees were entirely unconstitutional, but I do not think that that has any bearing upon the question we have to decide.

When this vessel, the *Cristina*, arrived in Cardiff, possession was taken, rightly or wrongly—it does not seem to me to matter—by the Spanish Government, and they claim, in answer to the claim of the ship-owners, to retain the possession which they have already taken. It was frankly admitted by Mr. Willink for the ship-owners that it is immaterial to our decision whether the Government of Spain claim to be the owners of the vessel, or whether they only claim to have a right of possession, the question being not

what was the nature of their claim, nor whether that claim was one on which they were likely to succeed, but whether they had or had not in fact submitted to the jurisdiction of this Court. Mr. Willink, in a bold argument, desired us to say that by reason of their conduct in seizing the vessel contrary to recognised principles of good international manners, we could not give effect to the rules which have been laid down so frequently with regard to the powers of the Courts of Justice in this country to make orders binding upon foreign Governments.

In my judgment, the case is entirely within the decision in the *Jupiter*, [1924] P. 236.* A claim was made by the owners for possession against somebody whom they alleged had interfered with their possession. The only people who had interfered with their possession was the Government of Spain, in the present case. Accordingly, they cannot succeed in their action *in rem* unless they are entitled to get an order against the Government of Spain. The Government of Spain says, in so many words: "We do not consent to the jurisdiction of the English Courts to make an order against us." Under those circumstances, I think there is ample authority for the proposition that the right order to make is the order which the learned Judge made.

In the course of his judgment in the *Jupiter*, Lord Justice Bankes, referring to the decision in the *Gagara*, [1919] P. 95, said, at p. 242:*

> In my opinion, that is contrary to all the principles upon which this Court has acted where a claim is made by a duly recognized independent Sovereign State. It seems to me that the necessary result of these proceedings is to call upon the Soviet Government to assert its title, and to have the question of the ownership, or the right to possession of this vessel, litigated in the Courts of this country.

That is what the plaintiffs are claiming here, that the right to possession of the *Cristina* shall be litigated in the Courts of this country. On the authority of the *Jupiter* and

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* 19 Ll. L. Rep. 325.

many other cases, that cannot be done. The rights of the owners and the rights of the crew, if there are any, must be asserted by diplomatic pressure, and cannot be asserted by a judgment of this Court.

For these reasons, I think the appeal should be dismissed, with costs.

Lord Justice SLESSER: I agree, and have only to add a short observation with regard to one point. Mr. Willink sought to distinguish this case from the case of the *Jupiter*, which I agree with my Lord entirely binds us in this present matter. He sought to say, as I understood him, that because of alleged improprieties on behalf of the Government which was claiming to be exempt from the jurisdiction of the Court—allegations about which I say nothing, whether they be well founded or not, for it is not for us to consider that matter—the comity of States which normally supports the exclusion of the right of action against the Sovereign Power should not prevail. I think that argument is not well founded, and I would only add this, that it is a recognised principle of law that the exemption of a foreign State from suit extends to cases where there is alleged a violation of a legal right, such as a tort, as well as in cases of contract, showing to my mind that whether the particular act done is or is not a wrongful one from the point of view of English law, the degree of the wrongfulness, whether, as in one case, it extends to a breach of promise of marriage, or, in another case, to an actual tort, is immaterial, that the exemption is absolute, and that the consideration which Mr. Willink urged is not one which this Court is justified in considering.

Lord Justice SCOTT: I agree with the judgments delivered, but think that the simplest way of stating the position is that before the writ was issued in this case, this vessel was already in the actual possession of the Spanish Government. Consequently that possession could not be displaced without an order of the Court upon the Spanish Government. That order, for the reasons given by my brothers, could not be made unless the Spanish Government consents that it should be made. It does not so consent, and the Court has, therefore, no jurisdiction in the matter, and must, in accordance

with the rule of comity, set aside the write as done by Mr. Justice Bucknill.

Mr. PILCHER: Your Lordships will dismiss the appeal, with costs?

Lord Justice GREER: Yes.

Mr. PILCHER: And the order will be that the writ and the arrest, and all subsequent proceedings, be set aside?

Lord Justice GREER: The order will remain as made by the learned Judge. The stay will be removed, of course.

Mr. WILLINK: May I make an application to your Lordships which will have a contrary result. On the matter as it stands at the moment, that, of course, would be so on the learned Judge's order. The arrest was only to remain effective until the appeal was heard. I did say to your Lordships, I hope correctly, that the limits of this principle have not been considered by the House of Lords. I should submit that this case is just such a case as would be suitable for an appeal to the House of Lords, and I would ask your Lordships' leave to appeal from this order, in view of what I have said, not that I am desirous of criticising in any way what your Lordships have said with regard to the *Jupiter*, but a matter of this kind should, in my submission, be considered by the supreme tribunal, and this is a case of such seriousness that it is a suitable one for an appeal. As I understand the position, there are a large number of cases in which vessels are held where there have been similar proceedings to these, and those proceedings are abiding the result of this case. If the House of Lords takes a contrary view, if the arrests have gone, and the ships are free, they may have gone to positions of extreme danger.

Lord Justice SLESSER: You, on your view, would want a stay until the House of Lords has reached a decision, otherwise the birds will have flown.

Mr. WILLINK: Yes, my Lord, and very likely have been blown up. I would ask your Lordships' leave to appeal to the House of Lords, and for the stay to be continued.

Lord Justice GREER: The two questions are independent?

Mr. WILLINK: Yes, my Lord.

Lord Justice GREER: I think it is quite a proper case for you to take the view of the House of Lords on the question,

but whether we should stay the order of the learned Judge in the meantime is quite another matter. We were asked to hear this case because it was necessary to have a quick decision. When you go to the House of Lords you will not get a quick decision.

Mr. WILLINK: No, my Lord, in the ordinary case, but my friends would no doubt take all necessary steps to get as quick a decision as possible.

Lord Justice GREER: Mr. Willink, we think the best thing we can do for you is to refuse you leave to appeal, but to say that you can say to the Committee that our reason for refusing it was that we did not anticipate that it could be heard quickly, and if you get an order for expedition then we encourage you to ask the House of Lords for leave to appeal with such expedition as they think they ought to give you. I think it will be better for you than giving you leave to appeal.

Mr. WILLINK: The only difficulty, if I may just mention it, is this: that in that situation this boat, and many other boats, will presumably sail to-night unless there is some short prolongation of the stay during which I can reach the Committee of the House of Lords. Would it be possible for your Lordships to give me an opportunity of finding out between now and the rising of the Court, the sittings of the Committee, so that then I can make an application for a short stay?

Lord Justice GREER: Very well.

[*A short adjournment.*]

Mr. WILLINK: Inquiries have now been made, and it is impossible to ascertain a definite time when the Committee of the House of Lords will deal with this matter. I was wondering whether your Lordships would maintain the stay for a week while we make further inquiries as to when our application to the House of Lords for leave to appeal and to maintain the arrest can be heard.

Lord Justice GREER: We are inclined to give a week's grace.

Mr. PILCHER: I do not wish to seem unreasonable, but one cannot blink one's eyes to actualities in this case. Your

Lordships remember that when I applied to accelerate the appeal to this Court the application was resisted, apparently for no reason at all as it turned out, although we had understood that both parties were anxious to get the matter disposed of, and we hoped finally disposed of. Here we have, on my friend's showing, something in the neighbourhood of £2,000,000 of shipping immobilised, and immobilised since last July. This is an extremely important matter.

Lord Justice GREER: If they are immobilised for another week it will not make much difference.

Mr. PILCHER: I do not think a week is unreasonable, but I should ask your Lordships to make it a week, and no more, because the matter, as I say, has dragged on a very long time already.

Lord Justice GREER: My idea was that we should adjourn the decision on the question as to whether we should give leave to appeal until another week has passed. When another week has passed Mr. Willink will be able to tell us whether he wants leave to appeal or not.

Mr. WILLINK: That is another way of putting it that has exactly the same effect. All I am asking is that the arrest shall be maintained until next Monday. What I shall in fact be doing during the week will be finding out when I can get the matter before the House of Lords.

Lord Justice GREER: We have come to a decision on the matter in which all three members of the Court are agreed, namely, that leave to appeal should be refused, but that there should be a stay for a week in order to see whether Mr. Willink can get on behalf of his clients the leave of the House of Lords to appeal upon such terms, expediting the matter or otherwise, as regards which he may satisfy the Committee.

Mr. WILLINK: If I find in the course of this week that the Committee might sit at the end of another week, I would come to your Lordships next Monday or next Friday, and ask for the stay to be extended for another week.

Lord Justice GREER: Yes, you can, but do not be too hopeful.

Mr. PILCHER: There are two other cases which do not appear in your Lordships' list to-day, but which were be-

fore Mr. Justice Bucknill, and I think similar orders were made with a similar condition as to a stay pending appeal. Notices of appeal were entered in all three cases, and all three cases did appear in the original draft list, but I understand that only the *Cristina* appears in your Lordships' list to-day. We should require a similar order in both of the other cases.

Lord Justice GREER: Very well, there will be a similar order in the other cases.

Friday, Nov. 12, 1937.

Mr. WILLINK stated that it had been ascertained that in view of the urgency of the matter the House of Lords Committee would sit on Monday, Nov. 22, to consider an application for leave to appeal.* In those circumstances Counsel asked the Court to continue the arrest of the *Cristina* until Nov. 24, so that, if necessary, he could come back to the Court and ask for an extension of the arrest.

The application was opposed by Mr. PILCHER.

Lord Justice GREER said that the Court would continue the stay until Nov. 24. His Lordship added: "I cannot help thinking that the time has come when it is desirable that there should be some revision of this question as to when and in what circumstances effect will be given to the usual rule that a foreign Government cannot be impleaded in this country."

* The Court of Appeal was subsequently informed that the House of Lords Committee had granted leave to appeal and had intimated that the appeal would be heard on Jan. 14 or 15, 1938. The Court therefore ordered the stay to continue until after the hearing of the appeal.

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SUPREME COURT OF THE UNITED STATES.

No. 242.—October Term, 1937.

Compania Espanola De Navegacion Maritima, S. A., Owner of the Spanish Steamship "Navemar", Petitioner, *vs.* Spanish Steamship "Navemar", Her Engines, etc., et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 31, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

In a suit in admiralty, brought in a district court by the alleged owner to recover possession of a Spanish merchant vessel, the Spanish Ambassador asked leave to intervene as claimant on the basis of an affidavit of the Spanish Acting Consul General suggesting that when the suit was brought the vessel was the property of the Republic of Spain, by virtue of a decree of attachment promulgated by the President of the Republic, appropriating the vessel to the public use, and that it was then in the possession of the Spanish Government. The principal question for decision is whether it was the duty of the court, upon presentation of the suggestion, to dismiss the libel for want of admiralty jurisdiction.

Petitioner, a Spanish corporation, brought the present suit in admiralty in the district court for eastern New York against the Spanish steamship "Navemar", five members of her crew, and all persons claiming an interest in her, to recover possession of the vessel. The libel alleged that petitioner was owner of the vessel, which was within the territorial jurisdiction of the court; and that while she was in petitioner's possession the individual respondents, acting as a committee of the crew, had wrongfully and forcibly seized, and had since retained possession of the vessel. After hearing evidence in support of the petition, the district court rendered its decree upon default, directing the marshal to place libelant in possession.

Thereupon the Spanish Ambassador filed a suggestion in the cause, challenging the jurisdiction of the court on the ground that the "Navemar" was a public vessel of the Republic of Spain, not subject to judicial process of the court, and asking that it direct delivery of the vessel to the Spanish Acting Consul General in New York. The suggestion alleged that when the suit was brought the "Navemar" was the property of the Spanish Government by virtue of its decree of October 10, 1936, and was in the possession of the Republic of Spain. The district court issued its order to show cause why the default should not be opened and the Ambassador permitted to appear specially as claimant of the vessel. After a hearing the court denied the application but with leave to the Ambassador to make further application upon fuller presentation of the facts showing the ownership and possession of the vessel by the Spanish Government.

Meanwhile the Department of State had refused to act upon the Spanish Government's claim of possession and ownership of the "Navemar", had declined to honor the request of the Ambassador that representations be made in the pending suit by the Attorney General of the United States in behalf of the Spanish Government, and had advised the Ambassador that his Government was entitled "to appear directly before the court in a case of this character."

A second application by the Ambassador for leave to appear as a claimant upon a verified suggestion, stating additional circumstances relied upon to establish possession of the vessel by the Republic of Spain, was denied. 18 Fed. Supp. 153. On appeal the Court of Appeals for the Second Circuit, after restricting the appeal to the order of the district court on the second application, reversed that order and directed that the libel be dismissed. 90 F. (2d) 673. We granted certiorari, — U. S. —, because the case is of public importance and because of alleged conflict of the decision below with our decision in *The Pesaro,* 255 U. S. 216, and with that of the Court of Appeals for the Fourth Circuit in *The Attualita,* 238 Fed. 909.

Respondent's suggestion on the second application presented two contentions: one, a challenge to the jurisdiction on the ground that the "Navemar" was a public vessel, immune from arrest and process of the court; the other, that the Spanish Government was owner of the vessel and entitled to her possession by virtue of the decree of attachment.

In addition to the general allegations of ownership and possession of the vessel by the Spanish Government in the first application, the suggestion in the second set up the acquisition of possession in behalf of the Spanish Government by specific acts of its consular officers in Argentina and in New York. It alleged that on October 26, 1936, the Spanish Consul at Rosario, Argentina, had endorsed on the ship's roll a statement that "Through a cable dated 26 of the inst month from the Director General of the Merchant Marine this ship has become the property of the State through attachment according to the Decree of Oct. 10, 1936", and that on October 28 the Spanish Acting Consul General at Buenos Aires had made a similar endorsement on the ship's register. It was also alleged that on arrival in New York in November the Spanish Acting Consul General at that port, by direction of the Ambassador, had instructed the master of the "Navemar" "to await and abide further instructions . . . as regards any further use of the" vessel, and that on November 28 he had instructed the master to render a detailed account of the expenses of the "Navemar" and of minor repairs that she might require. There was no averment that the alleged seizure by the members of the crew was an act of or in behalf of the Spanish Government.

The district court allowed a full hearing upon the suggestion and upon reply affidavits submitted by libelant, in the course of which there was opportunity for the parties to present proof of all the relevant facts. Cf. *Ex Parte State of New York, No. 2,* 256 U. S. 503. The court found that no one had taken possession of the "Navemar" in behalf of the Spanish Government. It pointed out that neither the ship's roll nor its register is a document of title or possession, the ship's roll being merely a record, in the case of Spanish vessels usually deposited with the Spanish consul while in port, showing arrivals and sailings of the vessel, the kind of cargo carried, the list of passengers, and the enrollment of the members of the crew, and the ship's register being only a record of the nationality of the vessel as determined by the place of her home port. It found that none of the consular officers mentioned had done any act purporting to take possession of the vessel; that none of them had informed the master that he wished to take possession or had any intention of doing so; that the vessel had pro-

ceeded under command of her master upon her voyage from Buenos Aires to New York, manned by officers and crew in the employ of petitioner; that upon arrival, the master, under direction of the ship's agent, had discharged cargo; and that before discharge the freight money was paid by the consignees to the agents of the time charterer in New York.

The district court, upon this and other evidence not necessary to detail, concluded that the "Navemar" was never in possession of the Spanish Government before her seizure by the members of the crew in the territorial waters of the United States, and that she was not a vessel in the public service of the Spanish Government.

The Court of Appeals, without reviewing the findings of the district court, or the evidence, adverted to the allegation of the first suggestion, substantially repeated on information and belief in the second, that the Spanish Consul at Rosario "pursuant to instructions from the Director General of the Spanish Merchant Marine, took possession of the . . . Navemar in the name of the Republic of Spain . . . whereby the . . . Navemar then and there became and at all times since has remained the property of the Government of the Republic of Spain." Declaring that the court was bound to accept this allegation as conclusive, it held that the vessel must be taken to be a public vessel owned by and in the possession of the Spanish Government, and as such immune from suit in the courts of the United States.

This we think was a mistaken view of the force and effect of the suggestion. Admittedly a vessel of a friendly government in its possession and service is a public vessel, even though engaged in the carriage of merchandise for hire, and as such is immune from suit in the courts of admiralty of the United States. *Berizzi Bros. Co.* v. *S. S. Pesaro,* 271 U. S. 562; compare *The Exchange,* 7 Cranch 116. And in a case such as the present it is open to a friendly government to assert that such is the public status of the vessel and to claim her immunity from suit, either through diplomatic channels or, if it chooses, as a claimant in the courts of the United States.

If the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United

States, or other officer acting under his direction. *The Cassius,* 2 Dall. 365; *The Exchange, supra; The Pizarro,* 19 Fed. Cas. No. 11,199; see *The Constitution,* L. R. 4 P. D. 39; compare *Ex Parte Muir,* 254 U. S. 522; *The Parlement Belge,* L. R. 4 P. D. 129. The foreign government is also entitled as of right upon a proper showing, to appear in a pending suit, there to assert its claim to the vessel, and to raise the jurisdictional question in its own name or that of its accredited and recognized representative. *The Sapphire,* 11 Wall. 164, 167; *The Anne,* 3 Wheat. 435, 445-446; *The Santissima Trinidad,* 7 Wheat. 283, 353; *Columbia* v. *Cauca Co.,* 190 U. S. 524; *Ex Parte Transportes Maritimos,* 264 U. S. 105; *Berizzi Bros. Co.* v. *S. S. Pesaro, supra.*

After refusal of the Secretary of State to act upon the present claim, the Ambassador adopted the latter course. His application to be permitted to appear and present the claim was properly entertained by the district court. But it was not bound, as the Court of Appeals thought, to accept the allegations of the suggestion as conclusive. The Department of State having declined to act, the want of admiralty jurisdiction because of the alleged public status of the vessel and the right of the Spanish Government to demand possession of the vessel as owner if it so elected, were appropriate subjects for judicial inquiry upon proof of the matters alleged.

But the filed suggestion, though sufficient as a statement of the contentions made, was not proof of its allegations. This Court has explicitly declined to give such a suggestion the force of proof or the status of a like suggestion coming from the executive department of our government. *Ex Parte Muir, supra; The Pesaro, supra. Berizzi Bros. Co.* v. *S. S. Pesaro, supra,* did not hold otherwise for there it was stipulated that the vessel, when arrested, was owned, possessed and controlled by a foreign government and used by it in carrying merchandise for hire. The sole question was one of law, whether, upon the facts stipulated, the vessel was immune from suit.

The district court concluded, rightly we think, that the evidence at hand did not support the claim of the suggestion that the "Navemar" had been in the possession of the Spanish Government. The decree of attachment, without more, did not operate to change the possession which, before the decree, was admittedly in petitioner. To accomplish that result, since the decree

was *in invitum,* actual possession by some act of physical dominion or control in behalf of the Spanish Government, was needful, *The Davis,* 10 Wall. 15, 21; *Long* v. *Tampico,* 16 Fed. 491, 493, 494; *The Attualita, supra; The Carlo Poma,* 259 Fed. 369, 370, reversed on other grounds, 255 U. S. 219, or at least some recognition on the part of the ship's officers that they were controlling the vessel and crew in behalf of their government.[1] Both were lacking, as was support for any contention that the vessel was in fact employed in public service. See *Long* v. *Tampico, supra,* 493, 494; cf. *Berizzi Bros. Co.* v. *S. S. Pesaro, supra.*

The district court rightly declined to treat the suggestion as conclusive or sufficient as proof to require the court to relinquish its jurisdiction. But as the suggestion was tendered in support of an application to appear as a claimant in the suit, and as it put forth a claim to title and right to possession of the vessel, the Ambassador should have been permitted to intervene and, if so advised, to litigate its claims in the suit. In *Ex Parte Muir, supra,* and in *The Pesaro, supra,* 219, the Ambassador of the intervening government challenged the jurisdiction of the court, but did not place himself or his Government in the attitude of a suitor. Here the application as construed by the trial court was for permission to intervene as a claimant. We think the applicant should be permitted to occupy that position if so advised.

The decree of the Court of Appeals will be reversed. The respondent will be permitted to intervene for the purpose of asserting the Spanish Government's ownership and right to possession of the vessel, and the order of the district court will be modified accordingly.

So ordered.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.

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[1] In The Jupiter, 1924 P. 236, 241, 244 (compare The Jupiter No. 2, 1925 P. 69; The Jupiter No. 3, 1927 P. 122, 125), and in the recently reported The Cristina, 59 Lloyd's List Law Reports 43, 50, on which respondent relies, the possession taken in behalf of the claimant government was actual. The judgment in The Cristina appears to have proceeded on that ground. In The Jupiter, it appeared that before the suit was brought the master had repudiated the possession and ownership of the plaintiffs and held the vessel for the claimant government. The report of The Cristina in the Admiralty Division, 59 Lloyd's List Law Reports 1, 3, indicates that the master and crew were in the pay of the Spanish Government.